STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 13, 2014
v	No. 317950 Macomb Circuit Court
ROBERT MICHAEL CHARBENEAU, Defendant-Appellant.	LC No. 2012-004427-FH

Before: WHITBECK, P.J., and FITZGERALD and MURRAY, JJ.

PER CURIAM.

Following his plea of no contest, defendant was convicted of unarmed robbery, MCL 750.530. He was sentenced to 38 to 180 months' imprisonment, with jail credit of 229 days. Defendant was also ordered to pay restitution to the victim in the amount of $1,953 and defense costs of $950. He appeals by delayed leave granted. We affirm.

Defendant first argues that his judgment of sentence must be corrected to show that payment of restitution was a "condition of parole." However, the judgment of sentence signed June 19, 2013, and filed on June 29, 2013, provided the relief that defendant seeks, as it states that restitution is "to be paid as a condition of parole." Therefore, this issue is moot. *People v Mansour*, 206 Mich App 81, 82; 520 NW2d 646 (1994).

Turning to his next issue, the trial court did not abuse its discretion when it ordered defendant to pay $1,953 in restitution, because the amount was supported by evidence in the record. Appellate review of a trial court's restitution order is for an abuse of discretion. *People v Fawaz*, 299 Mich App 55, 64; 829 NW2d 259 (2012). The trial court's factual findings are reviewed for clear error, but interpretations of law are reviewed de novo. *Id*. The prosecution bears the burden of proving the amount of restitution by a preponderance of the evidence, and the amount of restitution must be premised on the actual loss suffered by the victim. *Id*. at 65.

Upon review of the record, we conclude that the preponderance of the evidence supports the amount of restitution ordered by the court. The victim testified as to how much money she had in her possession before the robbery, and the evidence showed how much of that was recovered. The trial court ordered the difference as restitution. Defendant's contention that he could not have hidden any of the money because he was arrested immediately after the crime is disputed by the facts that (1) according to the warrant authorization, when the police officer went to defendant's home in response to a call concerning a suicidal subject, he observed an empty

PNC bank envelope in plain view, before obtaining permission to search the apartment, and (2) defendant had time to hide the stolen purse containing the remainder of the cash in the bathroom cabinet before the police arrived at his home. The amount of restitution was proven by a preponderance of the evidence. Therefore, the trial court did not abuse its discretion when it ordered restitution in the amount of $1,953, as it was the full amount of loss suffered by the victim. MCL 780.766b.

Next, defendant argues that he is indigent and has no present ability to pay the attorney fees, which are currently being taken from his prison account. He contends that, under *People v Jackson*, 483 Mich 271; 769 NW2d 630 (2009), he has the constitutional right to an ability-to-pay assessment. He asks this Court to order the trial court to amend or revoke the remittance order presently in place. However, *Jackson* does not provide for the relief that defendant is seeking. Under *Jackson*, an ability-to-pay assessment is only required when the imposition of a fee is enforced and the defendant challenges his ability to pay. *Id*. at 298. If a prisoner believes that unique, individualized circumstances exist to rebut the statutory presumption of nonindigency, he or she may petition the trial court to reduce or eliminate the amount owed "with evidence that enforcement would impose a manifest hardship on the prisoner or his immediate family." *Id.* at 297. Although the prisoner bears a heavy burden of establishing extraordinary financial circumstances in such a challenge, the trial court may reduce or eliminate the amount owed if it determines "that enforcement would impose a manifest hardship on the prisoner or his immediate family." *Id*.

Therefore, if a defendant wishes to challenge the imposition of fees on the ground of indigency, he must first do so before the trial court, under the guidelines set forth in *Jackson*. *Id*. at 296. There is no evidence that defendant petitioned the trial court to reduce or eliminate the amount that he was required to pay. Because defendant has not yet challenged the enforcement of the imposed fees at the trial court level, review of his challenge by this Court is inappropriate and premature.

Finally, defendant argues that the trial court abused its discretion in scoring Offense Variables (OVs) 3, 4, and 10 because the evidence did not support the court's scoring. First, we point out that the abuse of discretion standard of review is no longer applied to the scoring of the sentencing guidelines. When reviewing a trial court's scoring decision, the trial court's "factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430; 437-438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.* at 438.

OV 3 concerns "physical injury to a victim." MCL 777.33. When the victim suffers "[b]odily injury not requiring medical treatment," a score of five points should be assigned. MCL 777.33(1)(e). Defendant objected to the scoring of OV 3 at five points. However, the facts show that defendant punched the victim in the middle of her back, and that she complained of pain in the area where she had been struck but declined medical treatment. This evidence supports a finding by a preponderance of the evidence that the victim suffered "bodily injury not requiring medical treatment." Thus, the trial court did not clearly err in scoring 5 points for OV 3.

OV 4, MCL 777.34, is "psychological injury to a victim." MCL 777.34(2) provides, "Score 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." Defendant contends that the evidence was not sufficient to support the scoring of 10 points.

This Court has determined that depression and personality changes are sufficient to uphold the scoring of OV 4. *People v Ericksen*, 288 Mich App 192, 203; 793 NW2d 120 (2010). This Court has also held that a "victim's statement about feeling angry, hurt, violated, and frightened support his score under our case law." *People v Williams*, 298 Mich App 121, 124; 825 NW2d 671 (2012). See also *People v Gibbs*, 299 Mich App 473, 493; 830 NW2d 821 (2013) and *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004) ("Because the victim testified that she was fearful during the encounter with defendant, we find that the evidence presented was sufficient to support the trial court's decision to score OV 4 at ten points"). The victim's testimony in this case showed even more psychological injury than the victim in *Apgar*. The victim stated that she was "very traumatized" by the incident and, since the incident, she had been fearful to conduct business at the bank and fearful to carry a purse. In addition, because she lived near where the incident occurred, she had been fearful to be in her community because defendant might see her. The evidence supported a score of 10 points for OV 4 by a preponderance of the evidence. The trial court did not commit clear error.

Finally, defendant objects to the scoring of 10 points for OV 10. OV 10, MCL 777.40, is "exploitation of vulnerable victim." When "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status," a score of 10 points should be assigned. MCL 777.40(1)(b). There must be a finding that the victim was vulnerable to score points under OV 10. *People v Cannon*, 481 Mich 152, 158; 749 NW2d 257 (2008). " 'Vulnerability' means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c).

At sentencing, defendant contended that there was no "vulnerability" by the victim and alleged that the score was based solely upon the age of the victim. We disagree. The statute assigns 10 points if the offender "exploited" the victim's "agedness" and there was "readily apparent susceptibility . . . to injury." Here, the evidence showed that defendant exploited a vulnerable victim. Defendant was 25 years old and described as "six-foot, three hundred pounds." The victim was 67 years old. It was "readily apparent" that the victim was susceptible to injury.

Defendant's reliance on *People v Huston*, 288 Mich App 387; 794 NW2d 350 (2010), rev'd 489 Mich 451 (2011), to support this argument is misplaced. First, in *Huston* the issue concerned the scoring of OV 10 and whether there was "predatory conduct," which was not an issue in this case. *Id*. at 392-393. More importantly, *Huston* was reversed. *People v Huston*, 489 Mich 451; 802 NW2d 261 (2011). The trial court did not clearly err. The preponderance of the evidence showed that defendant exploited the victim's vulnerability.

Affirmed.

/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald
/s/ Christopher M. Murray